

The founding values of the second Republic in the introduction and the general principles of the Tunisian constitution

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In astrology, revolution signifies the complete rotation of a star on its own axis, until it returns to its starting point.

The concept was borrowed by the political world to refer to the process of an abrupt and radical overthrow of the public authorities in place, to establish a new order. Legally, this results in an unlawful transformation process of the constitutional order. It must be added that this process does not, under any circumstances, imply the actual existence of the State and the permanence of the State institutions.

Revolution is also defined by a movement that destroys the established order to establish another order, the outline and objectives of which are different. Indeed, insofar as a revolution aims to break with an established order, it also proposes another political regime, different rules of conduct, policies, and values.

Tunisians took to the streets to demand different values. They contested their state's injustice, nepotism and corruption.

The Tunisian constituent power therefore had to respond to this. The adoption of a new constitution was seen as inevitable, since it enabled the country to break with the former regime, and to become a second Republic founded on different values, values of the revolution: dignity, freedom and justice.

Dealing with the founding values of the new Republic is not only relevant, but necessary. To understand the founding values of the second Republic is to understand the spirit of the revolution.

However, any research on the founding values of a legal text first requires a certain clarification of the concepts.

Philosophers have taken great interest in the concept of values. Jurists have also placed particular importance on this, given the relationship between norms and values.¹

It is true that law refers to norms, and not to values. The former concern rights, duties, obligations, and rules, while the latter refer to the good, the bad, the best, or the worst.²

Values are also "linked to the ethical aspect of philosophy, while norms are connected to the regulatory and legal area."³

Norms and values are also different since "values are diverse and contentious... while norms aim for unity, coherence and systematics."⁴ In the same way, "Values are for purposes, whereas norms are for means."⁵

However, it is also true that norms and values are never totally separate since they can both

¹ See, for example, Rocher (J. C), *The ethical foundations of law*, Paris, ed. Fac, 1993. See also Trigeaud (J.-M.), *Metaphysics and ethics in the founding of law*, Bordeaux, ed. Bière, 1995.

² See Canto-Sperber (M.), Dir. *Dictionary of ethics and moral philosophy*, Paris, PUF, 2004, t. 2, article "norms and values".

³ Delastic (A.), A philosophical approach to values, change oneself to change the world?

⁴ Canto-Sperber (M.), Dir. *Dictionary of ethics and moral philosophy*, Paris, PUF, 2004, t. 2, article "norms and values".

⁵ *Ibid. loc. cit.*

be prescriptive. Furthermore, certain values have entered the legal field in order to end certain practices that are harmful to the humanity of man. This was the case of human dignity, which moved from the philosophical register to the legal register following the Second World War.⁶

The constitution is a legal text. It determines the legal rules that enable the political powers and those relating to the rights and freedoms of persons to be organised. These legal rules are not an end in themselves; they are set out to meet a societal need.

Is it possible to refer to values within a supreme legal text in this case?

It appears to us that this is indeed the case. The constitution of a State is a founding text of an entire political, legal, economic, social, and cultural system. This text is, in and of itself, the result of deliberation. In the Tunisian case, the constitution is the result of a long deliberation process since it was adopted by a pluralistic, diverse, and oftentimes even conflicting assembly.

Is it this observation that pushes us to seek the root of the founding values of the new Republic?

Our study of the constitutional text will be limited to its introduction and its first chapter, which are naturally dedicated to the general philosophy of the text.⁷ This study allowed us to observe that, although the constituent power was more or less unanimous with regard to the values integrated in the constitutional text, it had no perception of these values.

Like the constituent power, the Tunisian constitution ultimately floats between the universal values of freedom, equality, dignity, and values linked to a highly controversial and specific cultural identity.

Therefore, we were able to observe a constant tension between the values rooted in a universal register (I) and others that claim to be specific (II)

I. Values rooted in a universal register

Like several other constitutions, the introduction of the Tunisian constitution constitutes a defining element of the revolutionary moment.

Like any constitution, the introduction determines the spirit of the text, its philosophical, cultural, and political roots. And like any constitution, the introduction reflects the spirit of a people, their aspirations, expectations, and values.

We shall first of all begin by reiterating that the Tunisian constituent power ended a debate, with was, in truth, outdated, relating to the legal value of the introduction.⁸ In article 145, it announced that "the introduction of this Constitution forms an integral part of said Constitution." If we add to this, the provision of article 146 that provides that the provisions of the Constitution are inclusive and interpreted as a harmonious whole,⁹ we should take into consideration the whole text, even if the subject of our work shall only relate to the introduction and the first chapter.

One does not need to read very far in the constitution to see that, from the beginning, the view of the constituent power was of an authority in charge of drafting a constitution that fulfils the wishes of the people, with the goal of achieving the objectives of the revolution – freedom, dignity and

⁶ Human dignity was the subject of philosophy, including Kantian philosophy, until the Nazi crimes enabled the concept to rise up to a legal norm that the States are required to respect.

⁷ This is not to minimise the relevance of the rest of the constitution, but to be in accordance with the proposition of the organisers of the work.

⁸ Case law of the Tunisian administrative tribunal already ended this debate by ruling that the introduction has the same legal value as the rest of the text.

⁹ In the absence of an official translation, we are translating ourselves.

equality.

However, freedom, dignity, and equality are also at the foundation of the whole legal arsenal of human rights.¹⁰

Indeed, we believe that any human right whatsoever may ultimately be connected with three fundamental concepts – freedom, dignity, and equality.

These three values are the ultimate universal values. We would like to clarify that this universality does not have the same meaning as the universality of the origins of the values, but that of the universality of man/humans. In other words, human rights are universal, not because their origin is universal (which is debatable), but because the concept of protected human rights is universal.

The report of the commission on the introduction and the general principles attempted to outline the introduction. This report states that the third major focus is dedicated to founding the constitutional structure.¹¹ It is in this context that the report briefly refers to the human values and to human civilizational gains.

The reference to the universal in the text of the Tunisian constitution was therefore the subject of great controversy. The majority of the ANC was very resistant to the requests to make reference to universal values.

The democrat members of the assembly and a large part of Tunisian civil society battled to integrate the reference to universality in the constitution. Indeed, we can read in the introduction that the Tunisian people expressed its attachment "to human values and to the principles of universal and noble human rights".

The universality of values, those of human rights, seems, to us, to be implicitly declared. In addition, the Arab drafting of the text prevents us from knowing whether nobility and universality concern only human rights, or human rights and universal values. Regardless, it seems to us that the expression "noble" directly linked to human rights is extremely simplistic: it implies that there are principles in human rights that are noble, and others that are not.

Furthermore, it seems to us that universality is also timidly declared because it is not exactly a question of "human rights", but rather "principles of human rights." However, the expression "principles" is much more changeable since it does not necessarily imply all human rights. In addition, one only has to refer back to the doctrine to understand that "*the principles remain synonymous with abstract legal rules, providing the basis of a legal regime likely to apply to multiple, concrete situations, either to regulate these permanently, or to resolve the difficulties they may create.*"¹² The principles of human rights therefore leave a great deal of flexibility with regard to interpretation, but, in the same way, a great deal of uncertainty with regard to the effective respect of human rights by the infra-constitutional powers.

The rooting in the universal is therefore compromised by vague expressions, the meaning of which shall probably be determined by the constitutional judge, with difficulty.

The rooting in the universal is also compromised by a remarkable silence on international human rights law and in particular, the universal declaration of human rights. Indeed, unlike certain comparable constitutions, the Tunisian constituent power refused to make any reference to the Declaration and to international law in general.¹³ However, several experts have drawn the

¹⁰ See Hamrouni (S.) *Lessons on human rights intended for first year students of the basic law degree*, <http://www.salwa.hamrouni.gaddes.org/cours.php>

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¹² Virally (M.), "The role of "principles" in the development of international law", in. *International law in the making, Essays written over the years*, Paris, PUF, 1990, p. 197.

¹³ See, for example, the introduction of the Moroccan Constitution of 2011 (§ 3 and final paragraph).

constituents' attention to what a post-revolutionary text would gain in terms of credibility by making reference to international law in general, and to the texts on human rights in particular¹⁴. Finally, and after harsh criticism from experts in particular, the constituent power dedicated an article to international law.¹⁵ Indeed, with regard to this, it should be reiterated that in the first versions of the constitution, the superiority of treaties over laws was limited to the conventions approved by the chamber of representatives of the people, which excluded all of the conventions already ratified by the Republic, and which would open the way to ignoring these conventions, and most importantly, those that guarantee human rights. It was only following the intervention of the consensus commission, and at the last minute, that article 20 provided that "the international Treaties approved by the representative assembly and subsequently ratified have a supra-legislative and infra-constitutional status."

We cite this article essentially to draw the reader's attention to the fact that the universal values relating to human rights are, for the most part, repeated by international agreements. In addition, it was not by chance that straight after the revolution under the government of M. M. Ghannouchi, Tunisia ratified the majority of agreements relating to human rights, which the former regime feared. Incidentally, it appears to us that these ratifications raise a problem since they were not approved by the legislative power, as provided for by article 20.

In any case, it seems to us that the constitution of 2014 falls short of article 5 of the constitution of 1959, according to which "The Tunisian Republic guarantees the fundamental freedoms and human rights in their universal, global, complementary and inter-dependent acceptance." Indeed, it is this opening up to the universality, complementarity and inter-dependence of human rights that is missing in the text of the new constitution, and it is even more regrettable that the so-called Ben Ali constitution is more open than that of the revolution on this point.

Admittedly, there are references to other human values such as fraternity, solidarity, and social justice. It is also true that the constituent used the basis of "the place that the human being occupies as a dignified being." However, we all know that these values are accepted unanimously precisely because they have a single meaning. These values are presented in a disorganised manner. Some were presented as a foundation of the republic regime, like, for example, the equality accrued with difficulty "with regard to rights and duties between all citizens, male and female, and justice between the regions."¹⁶

Others are cited neither as a foundation nor as an objective, but simply as "dignified human values." This is the case for "science, employment, and creation".

Other values are cited with regard to Tunisia's international relations. While general international law was totally ignored in the introduction, world peace, cooperation with the peoples of the world, the triumph of the oppressed in all locations, the peoples' right to self-determination and liberation movements were cited.

¹⁴ See, with regard to this, the interpretation of Slim Laghmani Salsabil Klibi and Salwa Hamrouni regarding the first draft of the constitution, day organised by the ATDC and the ARTD, 15 January 2013 <https://www.youtube.com/watch?v=J30t4k-Lgg8>

See also Salwa Hamrouni regarding the introduction and the first chapter between the discussion and the adoption, day organised by the ATDC, 9 January 2014, <https://www.youtube.com/watch?v=diJKnh78hA4>.

¹⁵ Let us reiterate, in this respect, the deciding role played by the Tunisian Association of Constitutional Law, which monitored very closely the different drafts of the constitution, dedicating a study day for the related propositions. Let us also reiterate that the ATDC was, however, never tried out by this same constituent power.

¹⁶ Let us reiterate that the first draft of the constitution

The first chapter of the constitution, which is already easier to read as it is better structured, allows us to better see the universal values.

In the first two articles alone, we observe a concentration of references to republican values, the rule of law, citizenship, and popular will. Article 4, which honours the values of the revolution, revised the motto of the Republic, to include "Freedom, Dignity, Justice, Order." It is also in order to enforce the respect of these same values that article 12 sets forth the principle of positive action in favour of the most disadvantaged regions with the goal of creating a social justice that has not been achieved since independence was declared. This principle is now legally recognised to correct a de facto inequality that the principle of equality could not achieve.

Overall, universal values are both everywhere and nowhere in the constitutional introduction. The introduction and the first chapter make reference to them, but are often accompanied by restrictions, limitations, and specifications. In reality, they are in the thrall of more specific values that are the values of identity.

II. The influence of the values of identity

The fixation on identity divided the constituent power. In fact, this fixation almost neutralised the reference to universal values altogether. It impaired the values of the revolution.

Our aim here is not to deny the importance of the cultural characteristics of Tunisian men and women. Our aim is to first of all demonstrate that the values linked to cultural characteristics remain undetermined, and that, in this way, they become a pretext for limiting the universal values of dignity, equality, and freedom.

The final report of the commission on the introduction and the general principles, made public in 2012, dealt with the issue of the foundations of the constitutional structure in two concepts: the permanent features of Islam and human values.¹⁷

The reigning majority of the ANC had a major issue: how to integrate a maximum of references to Sharia law, or the next best alternatives - Islam, or the Arab-Muslim identity. Indeed, it is important to reiterate that the reference to Islamic Sharia law was one of the demands of the members of the Ennahdha party. Up until the last moment, certain constitutional revision proposals provided the Qur'an and the Sunni Islam as sources of legislation.¹⁸

It seems to us that the juxtaposition of the "constants of Islam" and "human values" is very revealing. Is this not an admission that these "constants," of which no one knows the content, are indeed in this way an obstacle to human values? Is this not the expression of an excessive reluctance of everything human and an evident preference for what is supposed to be divine?

The pressure from democrats, civil society, and all those who refused any reference to any law other than positive law resulted in the ANC ultimately attempting to find a middle-ground between these contradictory demands. This was called a consensus.

While certainly a consensus, it was a consensus with regard to the words, and not the meaning behind those words. The values that these words hold is therefore somewhat corrupted by the desire to say one thing, and then the opposite.

The introduction of the constitution remains filled with abundant references to cultural idiosyncrasies. In addition, it is surprising to see that even the order of the references expresses this

¹⁷ See http://www.arp.tn/site/main/AR/docs/rapport_final/rapport_final.pdf

¹⁸ 47 members of parliament voted in favour of a proposed amendment to make the Qur'an and Sunni Islam sources of legislation.

prevalence of the specific characteristics. In this way, the Tunisian constituent power always begins by reminding us of Arab-Muslim values, before citing the universal human values.

The different draft constitutions expressed the idea according to which the constitutional structure would be founded on the constants of Islam. It was only through the intervention of the consensus commission that the idea of constants of Islam was abandoned.

Indeed, we read in the second paragraph of the introduction "our people's commitment to the teachings of Islam, to their spirit of openness and tolerance" before the noble human values.

In the same way, the constituent took its inspiration first of all from "our cultural heritage, accumulated throughout our history, from our enlightened reformist movements that are based on the foundations of our Arab-Muslim identity" before the "gains of human civilisation". Based on this, we can safely say that for the majority of the ANC, the universal is always redefined according to the idiosyncrasies.

The founding values of the new Republic are therefore specific, rooted in an excessive and selective idiosyncrasy. Excessive, in view of the redundancy linked to the Arab-Muslim identity and selective since they reduce the history of Tunisia to the Arab-Muslim conquest. In this way, the founding values of the new Republic ignore the rights of Tunisian minorities. The Arab-Muslim identity certainly concerns the majority of Tunisians, but what about Jewish, Christian, Berber or other Tunisians?

One only needs to look at comparative law to see the difference between a constituent power guided by set ideological precepts and an open and flexible constituent power. With regard to this, we can cite the Kingdom of Morocco as an example, which expressed its attachment to a "unity, forged by the convergence of Arab-Islamist, Berber and Saharan-Hassanic components, nourished and enriched by its African, Andalusian, Hebraic and Mediterranean influences".

In Tunisia, our cultural and civilizational belonging to the Arab and Muslim nation is placed above our belonging to the human species. According to the constituent, we are therefore Arab-Muslims before we are humans! We are North Africans and Africans but not Mediterranean. Let us reiterate that the concept of adding the Mediterranean connection to the introduction was discussed, but this proposed amendment was only accepted by 105 members of parliament.¹⁹ A large proportion of the representatives of the Tunisian people therefore did not want to accept this cultural belonging, despite the objectiveness of the geographical location and despite Tunisia's affiliation with the Union for the Mediterranean.

From another perspective, we share the values of the Muslim and African peoples but we cooperate with the people of the world, and no more.

The values to which the introduction refers therefore remain largely contextualised, so what about the first chapter?

Reading this chapter allows us to make the same observation: the difficult insertion of universal values and the obsession with identity.

The preservation of the former first article of the constitution of 1959 partly summarises this state of mind, especially with the addition of a paragraph that forbids the revision of the article in question.

Admittedly, this article does not contain any prescriptive standards, and it is limited to

¹⁹ The refusal to mention the Mediterranean connection was justified by its relationship to the State of Israel.

declaring a fact: Islam is the religion of Tunisia and of the majority of Tunisians. However, it is also true that symbolically making reference to Islam as the religion and Arabic as the language refers to a well-defined system of values.

Article 6 of the constitution confirms this obsession with religion. The declaration according to which "the State is the guardian of religion" refers, in all likelihood, to a system of religious values. The question remains as to what religion this is referring to. The same article mentions places of worship and mosques to make reference to the different religions. Given that any society that claims to be democratic must accept tolerance and diversity, all types of religious beliefs must be taken into consideration, especially since these beliefs do not only change according to the religion, but also within the same religion.

It is for this reason that "the State is committed to disseminating the values of moderation and tolerance". It is specifically tolerance that is the basis for the acceptance of others, regardless of their religion or beliefs. However, let us reiterate that the same article 6 provides that the State is committed to "protecting all that is sacred and prohibits the violation of this." Here again, this is the price of the consensus: say one thing and the opposite at the same time. Basic research regarding the meaning of freedom of conscience and religion enables us to see that this freedom implies the choice of whether or not to believe in a religion. The concept of sacred therefore becomes relative since it differs according to the inner-self of each individual. Protecting all that is sacred may defend certain values but may also ignore other fundamental values, including the freedom of conscience.

Overall, we can confirm that the values that underlie the constitution of 27 January 2014 are a testament to a split identity: between aspiring for the universal and the obstacle of identity, and universal humanism and cultural idiosyncrasies seeking recognition.

One and the other may well co-exist in a democratic State based on pluralism and diversity. Furthermore, there is no political pluralism without axiological pluralism.²⁰

The quest for the universal is loyal to the spirit of the Tunisian revolution; what is highlighted in this case is what I share with others, my fellow-man in humanity. The quest for the specific characteristics creates the opposite: what is highlighted here is what distinguishes me from others, what makes me different to them.

However, we must not be mistaken: What Tunisian men and women are currently experiencing is not too different to what other peoples are experiencing: some are heading towards global citizenship, defending a cosmopolitan world, while others are closing in on themselves, defending often restrictive communitarianism or idiosyncrasies. The only relevant question is therefore whether both sides may find a minimum of common values, values that may enable them to live together peacefully.

²⁰ Weinstock (D.) "Wrong track: Does the path towards political pluralism go via axiological pluralism?" *The archives of the philosophy of law*, 2005, Pluralism, pp. 185-197.